LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
OCT 14 1957
JOHN T. FEY, Clerk

No. 365

In the Supreme Court of the United States

OCTOBER TERM, 1957

CITY OF NASHVILLE, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

MOTION TO AFFIRM

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D. C.

ROBERT W. GILEAN,
Assistant Attorney General,
[illegible],
Washington 25, D. C.

INDEX

	Page
Statement	1
Argument	6
Conclusion	20

CITATIONS

Cases:

Alleghany Corporation v. *Breswick & Co.*, 353 U. S. 151	19
Colorado v. *United States*, 271 U. S. 153	18
Federal Power Commission v. *Idaho Power Co.*, 334 U. S. 17	13
Financial Relations, etc., L. & N. R. Co 33 I. C. C. 168	2, 11
Ft. Worth & D. C. Ry. Co. Lease, 247 I. C. C. 119	12
Helvering v. *Davis*, 301 U. S. 619	18
Hopkins Savings Assn. v. *Cleary*, 296 U. S. 315	18
Louisville & Nashville Railroad Co. et al. Merger, etc., 295 I. C. C. 457	1, 2, 4, 8, 9, 13, 14, 15, 16, 17, 19
McLean Trucking Co. v. *United States*, 321 U. S. 67	6, 7, 8, 10, 15
N. L. R. B. v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1	18
New York v. *United States*, 257 U. S. 591	18
New York Central Securities Co. v. *United States*, 287 U. S. 12	6, 7, 9, 10
Railway Labor Executives Association v. *United States*, 339 U. S. 142	12
Schwabacher v. *United States*, 334 U. S. 182	18
Seaboard R. Co. v. *Daniel*, 333 U. S. 118	17, 18
Steward Machine Co. v. *Davis*, 301 U. S. 548	18
Texas v. *United States*, 292 U. S. 522	18
Universal Camera Corp. v. *N. L. R. B.*, 340 U. S. 474	15
United States v. *Capital Transit Co.*, 338 U. S. 286	19
United States v. *Darby*, 312 U. S. 100	18
United States v. *Marshall Transport Co.*, 322 U. S. 31	19
United States v. *Socony-Vacuum Oil Co.*, 310 U. S. 150	14
United States v. *Tucker Truck Lines*, 334 U. S. 33	1

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 365

CITY OF NASHVILLE, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

MOTION TO AFFIRM

Appellees, United States of America and Interstate Commerce Commission, pursuant to Rule 16, paragraph 1 (c), of the Revised Rules of this Court, move that the final judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment, entered on June 20, 1957, by a three-judge court convened pursuant to 28 U. S. C. 2325, dismissing appellants' complaint seeking to set aside an order of the Interstate Commerce Commission. This order, dated March 1, 1957, and entered in *Louisville & Nashville Railroad Company et al. Merger, etc.*,

295 I. C. C. 457, authorized a merger of the Nashville, Chattanooga & St. Louis Railroad into the Louisville & Nashville Railroad Company. In the same order, the Commission approved the acquisition of direct control, through stock ownership of the surviving corporation, by the Atlantic Coast Line Railroad Company, and of indirect control of the surviving corporation by the Atlantic Coast Line Company.[1]

L. & N. has controlled the N. C. & St. L. through stock ownership since 1880. Since 1872, the two railroads have participated in a solicitation agreement which was investigated by the Commission and reported to the United States Senate in *Financial Relations, etc., L. & N. Railroad Co.,* 33 I. C. C. 168 (1915). Pursuant to the Transportation Act of 1920, the Commission, in both its tentative and final plans of railroad consolidation, placed N. C. & St. L. in the same system with L. & N. and the Atlantic Coast Line (63 I. C. C. 455, 460; 159 I. C. C. 522, 534).

On January 28, 1955, the application for approval of the proposed merger under Section 5 (2) of the Interstate Commerce Act was filed with the Commission. Sectior 5 (2) provides that it shall be lawful, with the approval and authorization of the Commission, for two railroads to merge their properties or franchises into one corporation for management and operation, if the Commission finds the merger "con-

[1] The Commission found that L. & N. has been controlled, through stock ownership, since 1902 by the Atlantic Coast Line Railroad Co., which in turn is controlled by the Atlantic Coast Line Company (295 I. C. C. 461).

sistent with the public interest." Section 5 (2) (c) provides that in exercising its judgment in determining whether or not a particular merger is within the public interest, the Commission shall give weight (1) to the effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected. Section 5 (2) (f) provides that in the case of a transaction involving railroads, the Commission must impose conditions for the protection of railroad employees affected by its order. Section 5 (11) provides that upon Commission approval of a merger the parties are exempt from the operation of the antitrust laws, and all other prohibitions of law, both State and Federal, which would prevent them from carrying out the transaction.[2]

The appellants City of Nashville, Davidson County, Tennessee, the State of Tennessee, and the Tennessee Public Service Commission, intervened before the

---

[2] The Commission's order in this case also authorized L. & N., pursuant to Section 20a of the Interstate Commerce Act, to issue shares of its common stock in exchange for the publicly held shares of the N. C. & St. L. In the court below, no party challenged this portion of the Commission's order. However, subsequent to the entry of the judgment below, certain holders of common stock of N. C. & St. L. brought suit in the United States District Court for the Southern District of New York challenging the Commission's order insofar as it approves the issuance of 1½ shares of L. & N. common stock in exchange for each share of common stock of N. C. & St. L.

Commission in opposition to the proposed merger, as did certain common stockholders of N. C. & St. L. and the N. C. & St. L. Employees Job Protection Association (together with Luther Lambert and Vernon Hedgepath as employees of N. C. & St. L.).[3] No carriers opposed the application.

Hearings before a hearing examiner were conducted at Washington, D. C. from August 23 through August 26, 1955, at Nashville from August 30 to September 1, and again at Washington on September 13, 1955. Thereafter, the hearing examiner issued his report recommending that the Commission authorize the merger. Following exceptions to this report, oral argument was heard by the entire Commission. On March 1, 1957, the Commission issued its report and order authorizing the merger (295 I. C. C. 457). Its report concludes:

> We find, subject to the conditions for the protection of railway employees and the maintenance of existing joint routes, interchange arrangements and switching practices referred to above, that acquisition of control of the properties and franchises of The Nashville, Chattanooga and St. Louis Railway through merger into the Louisville and Nashville Railroad Company for ownership, management, and operation and acquisition of control by the Atlantic Coast Line Railroad Company of the surviving corporation through ownership of capital stock, and indirect control of such corporation by the Atlantic Coast Line Company as described

[3] The Association, Lambert and Hedgepath have taken a separate appeal from the judgment below in No. 519.

herein, are transactions within the scope of section 5 (2) of the Interstate Commerce Act, as amended; that the terms and conditions proposed are just and reasonable; and that the transactions will be consistent with the public interest.

On March 29, 1957, the City of Nashville instituted the present action and sought a temporary restraining order. On April 8, after a hearing, Judge Martin issued a temporary restraining order staying the effectiveness of the Commission's order pending determination of the case on the merits by a three-judge court. Also, on or about April 8, the State of Tennessee, the Tennessee Public Service Commission, Davidson County, certain employees of the N. C. & St. L., and the N. C. & St. L. Railway Employees Job Protection Association were permitted to intervene in support of the complaint, and the L. & N. and N. C. & St. L. were permitted to intervene as defendants. On April 24, 1957, the court entered an order permitting the plaintiffs to amend paragraphs 4 and 16 of their complaint.

Following briefs and oral argument on the merits before the three-judge court, it entered, on May 24, 1957, its unanimous findings of fact and conclusions of law sustaining the Commission's order and dismissing the complaints. Its judgment was entered on June 20, 1957.

The three-judge court conditioned a stay of its judgment pending appeal upon the appellants' posting a bond of $100,000. On August 15, Mr. Justice Brennan denied appellants' application for a stay of judgment without a bond.

Constitution and Statutes:

	Page
United States Constitution, Tenth Amendment	16, 18
Administrative Procedure Act, Sec. 8 (b), 5 U. S. C. 1007 (b)	16
Interstate Commerce Act, 24 Stat. 379, as amended, 49 U. S. C. 1, *et seq.*:	
Section 5	7, 8, 9, 10, 11, 12, 15, 16, 17
Section 5 (2)	2
Section 5 (2) (b)	6
Section 5 (2) (c)	3, 11, 12
Section 5 (2) (f)	3, 12
Section 5 (11)	3, 16, 17, 18
Section 15 (2)	20
Section 20a	3
Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. 1, *et seq*	9, 10, 11
Transportation Act of 1920, 41 Stat. 456	2

ARGUMENT

Most of the twelve questions presented by the appellants either ignore controlling decisions of this Court or are based upon out-of-context excerpts from the Commission's detailed report. None of them involves a substantial question.

1. In approving the merger of these two railroads, the Commission made the findings required by Section 5 (2) (b), *i. e.*, that the merger would be just and reasonable upon the terms prescribed by the Commission and that it is consistent with the public interest. The Commission concluded, citing this Court's decision in *New York Central Securities Co.* v. *United States*, 287 U. S. 12, 25, that "In administering these provisions we are to be guided primarily by consideration for adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities." And the Commission added that "Our task is to 'estimate the scope and appraise the effects of the curtailment of competition which will result * * * and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the over-all transportation policy.' *McLean Trucking Co.* v. *United States*, 321 U. S. 67" (295 I. C. C. 502–503).

2. The appellants contend (Juris. St. 13–16) that the Commission erred as a matter of law in authorizing a merger of "two strong railroads" and in concluding that

> The provisions of section 5 (2) of the act do not contemplate the unification of only those railroads which no longer can continue under separate ownership. The purpose of the law is to *foster and promote* the voluntary union of carriers into a sound and adequate transportation system for the future, and such union is permissible if it is otherwise consistent with the public interest.

We submit that it is clear on the face of Section 5 that its authorization of mergers approved by the Commission is not limited to weak or failing carriers. In *New York Central Securities Co.* v. *United States*, *supra*, sustaining an order of the Commission approving a lease to New York Central Railroad Co., of the properties of the Big Four railroad, there was no suggestion that the Commission's power was contingent upon one of those carriers being in poor financial condition or otherwise unable to operate independently. Similarly, in *McLean Trucking Co.* v. *United States*, *supra*, this Court's decision, upholding a Commission order authorizing a merger of seven large motor carriers, was in no way based upon a finding that some or all of such carriers were "weak" carriers.

The appellants' quarrel is with the Congress when they attack (Juris. St. 14–15) the statement in the Commission's report that the purpose of the merger provisions of Section 5 "is to foster and promote the voluntary union of carriers into a sound and adequate transportation system for the future, and such union is permissible if it is otherwise consistent with the

public interest." The appellants' real contention, that preservation of competition is the controlling legislative policy in Section 5, was rejected by this Court in *McLean Trucking Co. v. United States*, *supra*. Indeed, in that case, the Court went on to recognize that "authorization of consolidation of rail carriers stems historically from circumstances different from those impelling the authorization of consolidation of motor carriers" (321 U. S. at 85, fn. 22). And, after reviewing the history of the Act, it recognized "the altered emphasis in railroad legislation on achieving an adequate, efficient, and economical system of transportation through close supervision of business operations and practices rather than through heavy reliance on the enforcement of free competition in various phases of the business" (321 U. S. at 83).

The appellants also suggest that the Commission authorized the merger solely to "enable the surviving company to meet more effectively competition from other modes of transportation" (Juris. St. 15, 17). But the Commission found that "the accompanying savings and improved efficiency of operation necessarily would strengthen the applicants and render them capable of better service" (295 I. C. C., at 504); that "Single ownership and control of the properties will tend toward a more economical and efficient operation which, in turn, will inure to the benefit of the shipping public" (295 I. C. C. at 505); and "that the merger would strengthen the resulting system and make it more capable of rendering effective competition with the other railroads serving the South Atlantic coastal area" (295 I. C. C. at 488). In any

event, assuming, as does the National Transportation Policy, that a sound system of railroads is one component of an adequate national transportation system, it was entirely proper for the Commission to consider the extent and impact of competing modes of transportation and the ability of the combined railroads to compete with them.

The appellants' faint suggestion that the two railroads "are naturally competitive rather than complementary" (Juris. St. 16) and that this alleged circumstance precludes approval of their merger under Section 5, flies in the face of this Court's conclusion in *New York Central Securities Co.* v. *United States*, 287 U. S. at 26, that "whether the acquisition of control in the case of competing carriers will aid in preventing an injurious waste and in securing more efficient transportation service is thus committed to the judgment of the administrative agency upon the facts developed in the particular case."

2. The L. & N. has controlled the N. C. & St. L. through stock ownership since 1880. The Commission found that these two railroads "have been closely coordinated in service, operation, and managerial relations for more than 75 years" (295 I. C. C. at 486); that "under such circumstances, it cannot be said that an antagonistic competitive situation has existed between them" (*id.*, p. 486); and "that the reduction in competition resulting from the merger would be consistent with the public interest" (*id.*, p. 488). The appellants, asserting that this relationship violated the Sherman Act (enacted in 1890), contend that the Commission erred in approving the merger without

first ascertaining the competition which would have existed between these railroads if this relationship had not existed since 1880 (Juris. St. 18).

As this Court noted in *McLean Trucking Co.* v. *United States, supra,* at page 79 "the Commission has no power to enforce the Sherman Act as such." Congress has neither required nor empowered the Commission to determine the complicated factual issue of whether the acquisition of control of N. C. & St. L. by L. & N. in 1880 constituted or produced (then or later) an unreasonable restraint of trade or commerce in violation of the Sherman Act. Moreover, it would be impossible to estimate what would have been the competitive situation between these two railroads if the control relationship had never existed. Such a speculative rewriting of history could produce only conjecture over countless combinations of relationships between them and between each of them and other carriers. Significantly, there was no hint of such a requirement in *New York Central Securities Co.* v. *United States, supra,* in which this Court sustained the Commission's order under Section 5 approving long-term leases by the New York Central Railroad of the properties of Big Four and Michigan Central. New York Central had acquired stock control of those railroads long prior to 1920 (as here) and there already existed a substantial coordination of the three railroads.

Appellants also suggest that the Commission departed from its own policy in approving a merger when there allegedly was a prior and unlawful acquisition of control (Juris. St. 23). Of course, Sec-

tion 5 of the Interstate Commerce Act is prospective only; it does not require a historical review of pre-1920 mergers from which every major carrier in the country evolved. The Commission has both approved and disapproved, in terms of overall public interest, applications for approval of transactions subject to Section 5 where there had been prior acquisitions of control without approval under Section 5. We are aware of no case in which the Commission has withheld approval of an application under Section 5 because of the asserted illegality of relationships entered into prior to the enactment of Section 5 in 1920.[4]

3. The appellants contend (Juris. St. 27–29) that under Section 5 (2) (c) the impact of the proposed merger upon employees of the carriers precluded the Commission from approving it. Section 5 (2) (c) provides that "In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from

[4] The lack of merit of the appellants' second question is further evidenced by the fact that in 1915, following an investigation made at the request of the United States Senate, the Commission published the facts relating to L. & N.'s acquisition and exercise of control of N. C. & St. L., 33 I. C. C. 168. During the argument of the instant case before the three-judge court, counsel for the appellants conceded that they knew of no complaint of violation of the Sherman Act made by any of the appellants during the intervening 42 years.

the proposed transaction; and (4) the interest of the carrier employees affected." Section 5 (2) (f) generally provides that in approving a merger of railroads the Commission shall protect their employees "affected by such order [from] being in a worse position with respect to their employment" for a period of not less than four years. See *Railway Labor Executives Association* v. *United States*, 339 U. S. 142. Specifically, the appellants contend that the Commission erred in not giving controlling weight to the fact that some of the savings produced by the merger will result in reduction in employment and dislocation of other employees, and in not following an earlier decision in *Ft. Worth & D. C. Ry. Co. Lease*, 247 I. C. C. 119, in which one of several reasons for refusing to approve a lease of railroad properties was that the resulting savings for the first four years would be absorbed by the cost of the employee protective conditions.

We do not deny that a considerable portion of the savings resulting from this merger is in the form of reduced employment. Section 5 (2) (c), in requiring the Commission to "give weight" to "the interest of the carrier employees affected," can mean only that the Commission is not to approve a merger which produces savings which are insignificant compared to the dislocation of employees. If it means, as appellants contend, that as a matter of law the impact upon employees prohibits the Commission from approving a railroad merger which will result in estimated savings of at least $3,000,000 annually, then the possibilities of railroad consolidations under Section 5 in the

interest of an efficient and economical transportation system are illusory.

Finally, the merit of this contention of the appellants is sufficiently indicated by the fact that they have not yet challenged the Commission's finding, 295 I. C. C. at 502, that the labor protective conditions "which we hereby adopt, are more favorable than any heretofore imposed in merger cases."

The appellants further contend that the three-judge court violated the principle of *Federal Power Commission* v. *Idaho Power Co.*, 344 U. S. 17, by sustaining the Commission's order (in Conclusion of Law No. 11, Juris. St., p. 13a) "upon the express condition that the rights of the employees of the Nashville, Chattanooga & St. Louis Railway Company shall be protected equally with those of employees of the Louisville and Nashville Railroad Company as relates to seniority and to other conditions of employment in accordance with the express understanding as stated at the hearing by the attorney for the Interstate Commerce Commission and by attorneys for the two railroad carriers involved herein, disclosed in finding of fact Number 15." The appellants lack standing to raise such an issue. Moreover, they created it in the district court by arguing that the Commission had determined that the loss of jobs in the Nashville area would fall upon the employees of N. C. & St. L. The "condition" imposed by the court below merely reflects the obvious explanation of the Commission's counsel that the pertinent passage of its report merely identifies the jobs which will be affected and that the Commission is without power to determine the par-

ticular employees of the combined carriers who will be displaced or otherwise affected (See 295 I. C. C. at 500).

4. The appellants contend (Juris. St. 30–38) that the Commission erred in not requiring L. & N. to produce studies made by certain of its subordinate officials as to what traffic now handled by the two railroads would be lost as a result of the merger. These studies were sought to contradict the testimony of L. & N. officials that little if any traffic would be so lost. Clearly, the Commission was not required to permit an opinion poll of subordinate employees of L. & N. Moreover, a former officer of N. C. & St. L. testified for the appellants as to the results of such studies. The court below correctly held that there was no prejudicial error in the exclusion of this material. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 229–231.

Similarly, it is contended that the Commission erred in not requiring the two railroads to produce information as to the number of employees in their respective accounting departments before machine accounting was installed, as compared with the number at the time of the hearing (Juris. St. 33–35). While admitting that the merger would produce accounting savings, appellants sought this information to attempt to prove that those departments were overstaffed. In view of the collateral nature of this issue, the Commission's refusal to require production of the data was well within the discretion of the trier of facts in a large and complicated proceeding. In any event, the matter relates only to an unspecified

portion of estimated annual accounting savings of $369,000 (295 I. C. C. at 491) out of total estimated annual savings of more than $3,000,000 (295 I. C. C. at 492).

The appellants also complain of the Commission's refusal to require the railroads to produce figures as to the number of cars interchanged between them at Nashville in 1951 and 1952, which appellants contend would show the effect of a 1951 change in a solicitation agreement between the two railroads which had existed since 1872 (Juris. St. 35–36). Not only was this a collateral inquiry, but it was embraced in the appellants' erroneous contention that the Commission must appraise the merger in the light of the competition that might have existed in the absence of a control relationship between them since 1880.

5–7. The appellants' contention (Juris. St. 38–39) that the three-judge court failed to discharge its reviewing function is wholly without merit under *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 87–88, and *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474, 488. The Federal courts have recognized repeatedly the broad range of discretionary responsibility which Section 5 imposes upon the Commission with respect to carrier mergers and consolidations. The appellants' related attack upon the Commission's evaluation of the evidence is no more than a contention that the three-judge court should have substituted its judgment for that of the Commission upon an independent evaluation of fragments of the record.

8–9. The appellants' contentions that the Commission's findings do not satisfy the requirements of Section 8 (b) of the Administrative Procedure Act (5 U. S. C. 1007 (b)), and that its conclusion that the proposed merger will be consistent with the public interest is not supported by the record (Juris. St. 44–45), find their best answer in the Commission's detailed report (295 I. C. C. 457–507). The three-judge court concluded (Juris. St. 10a): "The findings of the Commission are full and complete and are supported by substantial evidence. They constitute sufficient basis for the order of the Commission herein."

10. It is further contended that the Commission's order is void on the ground that N. C. & St. L., a Tennessee corporation, is not authorized by Tennessee law to merge into another corporation (*i. e.*, L. & N.). From this premise, the appellants apparently argue (1) that the Commission's order is permissive and does not undertake to confer authority not given by State law, (2) that Section 5 (11) of the Interstate Commerce Act does not empower the Commission to authorize a merger not authorized by State law, and (3) that if Section 5 (11) is not so interpreted it violates the Tenth Amendment (Juris. St. 45–50).

All Commission orders authorizing transactions covered by Section 5 are permissive. In this case, the Commission's order expressly authorized "acquisition of control of the properties and franchises of the Nashville, Chattanooga & St. Louis Railway *through merger* into the Louisville & Nashville Railroad Company." Clearly, the Commission intended

to, and did, authorize completion of the merger without regard to Tennessee law.[8] In *Seaboard R. Co.* v. *Daniel*, 333 U. S. 118, 124, an identical claim as to the purport of a Commission order under Section 5 was brushed aside by this Court.

Section 5 (11) specifically empowers carriers participating in a merger approved by the Commission to carry it out without regard to state law. Thus, Section 5 (11) provides in part that—

> The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power * * * to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees, and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the anti-trust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and

[8] The Commission's intention is further indicated by its denial of the appellants' motion to dismiss the application under Section 5, based upon the same contention as to Tennessee law (295 I. C. C. at 459.)

> operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.

The appellants' contention that Section 5 (11) does not supply omissions in Tennessee law has been rejected already by *Seaboard R. Co.* v. *Daniel, supra,* in which this Court held that the last sentence of Section 5 (11) "clearly authorizes a railroad corporation to exercise the powers therein granted over and above those bestowed upon it by the state of its creation" (333 U. S. at 126). See also *Schwabacher* v. *United States,* 334 U. S. 182, 198; *Texas* v. *United States,* 292 U. S. 522, 530–531.

Appellants' contention that Section 5 (11) violates the Tenth Amendment if it is interpreted to authorize this merger is also without merit. The plenary power of Congress to regulate interstate commerce is not subordinated by the Tenth Amendment to the regulatory policies of a State. *New York* v. *United States,* 257 U. S. 591; *Colorado* v. *United States,* 271 U. S. 153.* And see *Steward Machine Co.* v. *Davis,* 301 U. S. 548; *Helvering* v. *Davis,* 301 U. S. 619; *N. L. R. B.* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1; *United States* v. *Darby,* 312 U. S. 100.

---

* *Hopkins Savings Assn.* v. *Cleary,* 296 U. S. 315, the appellants' sole reliance, expressly distinguishes the rule of the *New York* and *Colorado* cases.

11. It is further contended by the appellants that the Commission's order is invalid because the Mercantile-Safe Deposit & Trust Company did not join in the application for approval of the merger. In the instant proceeding, the Commission found that L. & N. is controlled by the Atlantic Coast Line Railroad Company which owns 35.2% of its common stock, and that the latter is controlled by the Atlantic Coast Line Company, which owns 28.58% of its voting stock (295 I. C. C., at 461). Both of those companies joined in the application and obtained the Commission's approval of their acquisition of direct and indirect control, respectively, of the surviving railroad in the merger. Although the appellants participated fully in the proceedings before the Commission, they contended for the first time in the court below that Mercantile-Safe Deposit & Trust Co. controlled the Coast Line Company and, therefore, was a necesssary party to the application under the doctrine of *United States* v. *Marshall Transport Co.*, 322 U. S. 31.

In *Alleghany Corporation* v. *Breswick & Co.*, 353 U. S. 151, this Court held that the failure to join a remote non-carrier parent company (such as the Trust Company) does not deprive the Commission of jurisdiction over more direct parent companies and the carriers controlled by them. Since the failure of the Trust Company to join in the application was not a jurisdictional defect, the appellants' failure to raise the issue before the Commission precludes them from doing so for the first time in the courts. *United States* v. *Capital Transit Co.*, 338 U. S. 286, 291; *United States* v. *Tucker Truck Lines*, 344 U. S. 33, 37.

12. Finally, the appellants contend that the Commission's order is invalid under Section 15 (2) of the Interstate Commerce Act, which provides that "all orders of the commission, * * * shall take effect within such reasonable time, not less than thirty days, * * * according as shall be prescribed in the order, * * *."

The Commission's order was dated March 1, 1957, and specified "that this order shall become effective 40 days from its date"—or April 10. Due to delay in duplicating the 75-page report and order, it was not released until March 13—or 28 days before its effective date. However, when the matter was first called to the Commission's attention by paragraph 19 of the complaint, the Commission, on April 3, 1957, postponed the effective date of its order to April 12. This was done for the sole purpose of avoiding unnecessary litigation of the question. On April 8, Judge Martin issued a temporary restraining order staying the effectiveness of the Commission's order pending determination of the suit on the merits by a three-judge court. Thereafter, the appellants twice amended their complaints. Under these circumstances, their contention that they were prejudiced is frivolous.

CONCLUSION

The judgment of the three-judge district court should be affirmed.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

ROBERT W. GINNANE,
General Counsel,
Interstate Commerce Commission.

U. S. GOVERNMENT PRINTING OFFICE: 1957